TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 575

WILLIAM ELMER BROWN, JR., PETITIONER,

vs.

EDWARD J. O'KEEFE, RECEIVER OF THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 18, 1936.

CERTIORARI GRANTED JANUARY 18, 1937.

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IN THE

District Court of the United States,

DISTRICT OF NEW JERSEY.

L-4392. ACTION AT LAW.

EDWARD J. O'KEEFE, RECEIVER OF THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.

v.

WILLIAM ELMER BROWN, JR.

DOCKET ENTRIES.

Mar. 26, 1934.	Summons issued.
Mar. 29, 1934.	Affidavit of Merits filed.
Apr. 2, 1934.	Summons and Complaint returned, served March 28, 1934, filed.
Apr. 12, 1934.	Answer filed.
Apr. 18, 1934.	Notice of Fixing Place for trial filed (Camden).
Dec. 7, 1934.	Notice of Motion for entry of Summary Judgment and Affidavit filed.
Dec. 14, 1934.	Order continuing return day of Notice of Motion, filed.
Jan. 17, 1935.	Order continuing return day of Notice of Motion, filed.
Mar. 8, 1935.	Order continuing return day of Notice of Motion, filed.
Apr. 13, 1935.	Hearing on motion for Summary Judgment. Decision Reserved (J. Avis).

Apr. 13, 1935.	Affidavit of Defendant, filed.
Apr. 13, 1935.	Affidavit of Plaintiff, filed.
Apr. 24, 1935.	Order Substituting Party Plaintiff, filed.
July 19, 1935.	Memorandum filed (J. Avis).
July 23, 1935.	Order Striking Answer and for Summary Judgment for Plaintiff for $1092. and Costs, filed.
Sept. 4, 1935.	Exception filed.
Sept. 10, 1935.	Notice of Appeal filed.
Sept. 10, 1935.	Assignment of Errors filed.
Sept. 10, 1935.	Petition of Appeal filed.
Sept. 10, 1935.	Order Allowing Appeal filed.
Sept. 10, 1935.	Bond filed.
Sept. 10, 1935.	Citation issued.
Sept. 13, 1935.	Citation returned, service acknowledged September 12. Copy filed.

COMPLAINT.

(Filed April 2, 1934.)

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF NEW JERSEY.

ACTION AT LAW.

Laurence A. Slaughter, Receiver of the Union National Bank of Atlantic City, N. J.,
Plaintiff,

v.

William Elmer Brown, Jr.,
Defendant.

Laurence A. Slaughter, Receiver of the Union National Bank of Atlantic City, N. J., complains and says:

1. That the Union National Bank of Atlantic City, N. J., is a national banking corporation organized under and by virtue of the National Banking Laws of the United States of America, and prior to the thirtieth day of September, A. D. 1931, was engaged in the general banking business, having its principal office in the city of Atlantic City, County of Atlantic and State of New Jersey.

2. That on the thirteenth day of December, A. D. 1933, complainant was appointed receiver of the Union National Bank of Atlantic City, N. J., by the Comptroller of the Currency of the United States of America, and duly qualified and took upon himself the burden of administering the affairs of said bank, and

ever since said date has been and now is the appointed, qualified and acting receiver thereof.

3. That on and prior to the thirteenth day of December, A. D. 1933, William Elmer Brown, Jr., the defendant in this suit, was and still is the owner of ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J., of the par value of $100 per share, as shown by the books of said bank.

4. That on or about the eighth day of January, A. D. 1934, the Comptroller of the Currency of the United States duly found and determined that in order to pay the debts of the said Union National Bank of Atlantic City, N. J., it is necessary to enforce the individual liability of the stockholders thereof to the extent of $100 upon each and every share of the capital stock of said association as provided by law.

5. That on or about the eighth day of January, A. D. 1934, the said Comptroller, in the manner and as by law provided, did make said assessment upon the shares of the stock of said association, including the shares owned by the said defendant, as shown by the books of said bank; and did direct plaintiff, as receiver of the Union National Bank of Atlantic City, N. J., to take all necessary proceedings by suit or otherwise to enforce the extent of the said individual liability of the stockholders of said bank.

6. That due and timely notice of said assessment was given to said defendant and demand made upon him to pay the amount of his said assessment, but the said defendant neglects and refuses to pay the same.

7. That this suit is prosecuted by an officer of the United States of America to enforce the liability fixed and prescribed by the laws of the United States in an

effort to wind up the affairs of a national banking association, and this Court has jurisdiction of the subject matter thereof.

8. That by virtue of the premises and of the statutes in such case made and provided, the said defendant became and is indebted to plaintiff in the sum of $1000, together with interest thereon at 6 per cent. per annum from the eighth day of January, A. D. 1934.

WHEREFORE, a cause of action has arisen in favor of this plaintiff against the defendant, William Elmer Brown, Jr., and plaintiff demands damages in the sum of $1000, together with interest thereon at 6 per cent. per annum from the eighth day of January, A. D. 1934.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

To the within named defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of the service hereof upon you, and that unless you file such affidavit, judgment by default will be entered against you at the end of said ten days, and that, in case you file said affidavit, unless you file an answer within twenty days from the date of service hereof upon you, judgment by default will in such case be entered against you at the end of said twenty days.

(Note—Lawful service upon a corporation defendant is personal service for the above purpose.)

BOURGEOIS & COULOMB,
Attorneys.

ANSWER.

(Filed April 12, 1934.)

William Elmer Brown, Jr., the defendant in the above-entitled cause, answering the plaintiff's complaint filed herein, says that:

1. He admits paragraph 1.

2. He admits paragraph 2.

3. He denies paragraph 3.

4. He admits paragraph 4.

5. He admits paragraph 5 except that he denies that he was the owner of any shares of the stock of said association at the time of said assessment.

6. He admits that notice of said assessment was given to him; that demand was made upon him to pay said assessment; and that he has refused to pay same.

7. He admits paragraph 7.

8. He denies paragraph 8.

FIRST DEFENSE.

1. On April 21, 1933, defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey and all right, title and interest of the defendant in and to the said ten shares of stock by act of law was immediately transferred to and vested in the trustee duly appointed for said defendant bankrupt, whereupon the defendant lost all dominion and control over the said shares of stock.

2. Said trustee has not disclaimed title to the said ten shares of stock to defendant.

3. At the date of the assessment levied as aforesaid defendant in law and in fact was not the legal or equitable owner of said ten shares of the stock of said Union National Bank of Atlantic City, N. J., upon which said assessment was levied.

4. The title to said stock was transferred to and vested in the said trustee by act of law more than sixty days prior to the appointment of the said receiver.

SECOND DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

THIRD DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. The defendant's liability for assessment upon the said ten shares of stock of the Union National Bank of Atlantic City, N. J., was a provable debt or claim at the time of defendant's adjudication and discharge in bankruptcy.

FOURTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. The defendant's liability for assessment upon the said ten shares of stock of the Union National Bank of Atlantic City, N. J., was as surety and was provable against defendant's bankrupt estate at the time of his adjudication and discharge.

FIFTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union

National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. The defendant's liability for assessment upon the said ten shares of stock of the Union National Bank of Atlantic City, N. J., was a debt or liability founded upon an implied contract and was provable at the time of defendant's adjudication and discharge in bankruptcy.

SIXTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. The defendant's liability for assessment upon the said ten shares of stock of the Union National Bank of Atlantic City, N. J., had accrued at the time of and prior to defendant's discharge in bankruptcy as aforesaid and was then a provable debt or claim.

SEVENTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United Stats District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. Prior to defendant's adjudication and discharge in bankruptcy said the Union National Bank of Atlantic City, N. J., had become insolvent and had closed its doors for business and therefore defendant's liability on his aforesaid stock was then fixed and provable.

EIGHTH DEFENSE.

1. On or about September 30, 1931, the Union National Bank of Atlantic City, N. J., discontinued business, went into liquidation and was closed all in accordance with the law in such cases made and provided.

2. By agreement entered into between said the Union National Bank of Atlantic City and the Atlantic City National Bank, a banking corporation of the United States of America, having its principal place of business at Atlantic City, N. J., dated September 30, 1931, said the Atlantic City National Bank was designated as the liquidating agent of and for the said the Union National Bank of Atlantic City and said the Atlantic City National Bank then and there immediately entered into possession of all property and assets of said the Union National Bank of Atlantic City.

3. On or about the aforesaid date, and in accordance with the terms of the aforesaid agreement and understanding, all of the deposit accounts of the Union National Bank of Atlantic City became and were merged and mingled with the deposit accounts of the said the Atlantic City National Bank.

4. On January 30, 1933, the Atlantic City National Bank was declared insolvent by the Comptroller of the Currency of the United States of America and Laurence A. Slaughter, who, as receiver of the Union National Bank of Atlantic City, is the plaintiff herein, was duly appointed receiver of said the Atlantic City National Bank and immediately entered into possession of the property and assets of the Union National Bank of Atlantic City under the terms and provisions of said agreement dated September 30, 1931, as well as the property and assets of said the Atlantic City National Bank.

5. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

6. On July 31, 1933, this defendant was discharged of all of his debts and claims.

7. The said ten shares of stock of the Union National Bank of Atlantic City mentioned in plaintiff's complaint were included in the schedule of assets filed by this defendant in said bankruptcy proceeding and this defendant's liability for assessment on the said stock was listed among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

8. Defendant's said liability for assessment on said stock, at the time of his aforesaid adjudication and discharge, was a provable debt or liability fixed, ascertainable or capable of liquidation.

NINTH DEFENSE.

1. On September 30, 1931, the Union National Bank of Atlantic City, N. J., was placed in voluntary liquidation under and by virtue of the law in such cases made and provided and the Atlantic City National Bank was appointed liquidating agent therefor.

2. On January 30, 1933, the Atlantic City National Bank was declared insolvent by the Comptroller of the Currency of the United States of America and Laurence A. Slaughter, who, as receiver of the Union National Bank of Atlantic City, is the plaintiff herein, was duly appointed receiver of said the Atlantic City National Bank and immediately entered into possession of the property and assets of the Union National Bank of Atlantic City under the terms and provisions of said agreement dated September 30, 1931, as well as the

property and assets of said the Atlantic City National Bank.

3. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

4. On July 31, 1933, this defendant was discharged of all of his debts and claims.

5. The said ten shares of stock of the Union National Bank of Atlantic City mentioned in plaintiff's complaint were included in the schedule of assets filed by this defendant in said bankruptcy proceeding and this defendant's liability for assessment on the said stock was listed among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

6. Defendant's said liability for assessment on said stock, at the time of his aforesaid adjudication and discharge, was a provable debt or liability fixed, ascertainable or capable of liquidation.

TENTH DEFENSE.

1. On or about December 15, 1931, said the Union National Bank of Atlantic City, N. J., went into liquidation and became closed in accordance with the authority and provisions of the law in such cases made and provided and said the Atlantic City National Bank was appointed liquidating agent therefor.

2. On January 30, 1933, the Atlantic City National Bank was declared insolvent by the Comptroller of the Currency of the United States of America and Laurence A. Slaughter, who, as receiver of the Union Union National Bank of Atlantic City, is the plaintiff herein, was duly appointed receiver of said the Atlantic

City National Bank and immediately entered into possession of the property and assets of the Union National Bank of Atlantic City under the terms and provisions of said agreement dated September 30, 1931, as well as the property and assets of said the Atlantic City National Bank.

3. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

4. On July 31, 1933, this defendant was discharged of all of his debts and claims.

5. The said ten shares of stock of the Union National Bank of Atlantic City mentioned in plaintiff's complaint were included in the schedule of assets filed by this defendant in said bankruptcy proceeding and this defendant's liability for assessment on the said stock was listed among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

6. Defendant's said liability for assessment on said stock, at the time of his aforesaid adjudication and discharge, was a provable debt or liability fixed, ascertainable or capable of liquidation.

ELEVENTH DEFENSE.

1. On or about September 30, 1931, the Union National Bank of Atlantic City, N. J., sold all of its property and assets to said the Atlantic City National Bank for a definite and fixed consideration to be paid by the assumption of all liabilities of said the Union National Bank then existing except liabilities to shareholders as such.

2. By the agreement then made between them said the Union National Bank agreed to pay to said the

Atlantic City National Bank, upon demand, a sum equal to any loss which it might sustain by reason of the assets so sold, liquidating less than the value herein placed upon them, with interest until liquidated.

3. Promptly after the transfer of said assets as aforesaid, said the Atlantic City National Bank paid all the liabilities of said the Union National Bank as agreed.

4. As a result of the transfer of said assets and the assumption and payment of said liabilities as aforesaid, said the Union National Bank of Atlantic City, N. J., thereafter had no debts, claims or liabilities outstanding and owing by it except such as it might thereafter have to said the Atlantic City National Bank under and by virtue of the terms of the aforesaid agreement.

5. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

6. On July 31, 1933, this defendant was discharged of all his debts and claims.

7. The said ten shares of stock of the Union National Bank of Atlantic City mentioned in plaintiff's complaint were included in the schedule of assets filed by this defendant in said bankruptcy proceedings and this defendant's liability for assessment on the said stock was listed among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

8. Defendant's liability for assessment on said stock for the payment of any debt or liability due to said the Atlantic City National Bank from said the Union National Bank was a provable debt or claim ascertainable or capable of liquidation at the time of defendant's adjudication and discharge as aforesaid.

TWELFTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. Prior to defendant's adjudication and discharge as aforesaid said the Union National Bank went into liquidation and became closed in accordance with the authority and provisions of the law in such cases made and provided and said the Atlantic City National Bank was appointed liquidating agent therefor.

7. Defendant's liability for assessment on said stock for the payment of any debt or liability due to said the Atlantic City National Bank, as liquidating agent or otherwise, or to any other creditor was a provable debt or claim ascertainable or capable of liquidation at the time of defendant's adjudication and discharge as aforesaid.

THIRTEENTH DEFENSE.

1. On April 21, 1933, this defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey.

2. On July 31, 1933, this defendant was discharged of all his debts and claims.

3. The said ten shares of stock of the Union National Bank of Atlantic City, N. J., were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City, N. J., was included in the list of creditors filed therein.

4. This defendant also stated his liability for assessment on the said ten shares of stock of the Union National Bank of Atlantic City, N. J., among the various debts and liabilities then existing against said defendant and from the payment of which he asked to be discharged.

5. Defendant's liability for assessment on said bank stock was not excepted from the operation of his aforesaid discharge in bankruptcy.

6. Prior to defendant's adjudication and discharge as aforesaid said the Union National Bank went into liquidation and became closed in accordance with the authority and provisions of the law in such cases made and provided and said the Atlantic City National Bank was appointed liquidating agent therefor.

7. Defendant's liability for assessment on said stock for the payment of any debt or liability due to said the Atlantic City National Bank as liquidating agent or otherwise, or to any other creditor was capable of being enforced at the time of defendant's adjudication and discharge as aforesaid.

BOLTE & TRIPICIAN,
Attorneys for Defendant.

NOTICE OF MOTION AND AFFIDAVITS.

(Filed December 7, 1934.)

To Bolte & Tripician, Esqs., Attorneys for Defendant,

Sirs:

TAKE NOTICE, that on Friday, the fourteenth day of December, A. D. 1934, at ten-thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall make application to his Honor, John Boyd Avis, Judge of the above-stated court, or such other Judge as may be holding said court, at the United States Court House, Fourth and Market Strets, Camden, New Jersey, to strike the answer filed by you on behalf of said defendant upon the grounds:

(A) That said answer is sham, in that on and prior to the thirteenth day of December, A. D. 1933, William Elmer Brown, Jr., the defendant in this suit, was and the said William Elmer Brown, Jr., defendant, still is the owner of ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J., of the par value of $100 per share, as shown by the books of said bank, which said allegation you deny in the answer filed by you on behalf of said defendant; said answer is further sham, in that on or about the eighth day of January, A. D. 1934, the Comptroller of the Currency of the United States of America in the manner and as by law provided, did, in fact make an assessment upon the shares of stock of the said the Union National Bank of Atlantic City, N. J., including the shares owned by the said defendant, William Elmer Brown, Jr., as shown by the books of said bank, and said Comptroller did in fact direct plaintiff as receiver of the Union National Bank of Atlantic City, N. J., to take all necessary proceedings by suit or otherwise to enforce the extent of the said individual liability of the stockholders of said bank,

which allegation you also deny in the answer filed by you on behalf of said defendant; that said answer is further sham, in that the said defendant is in fact and in law justly and truly indebted to the plaintiff herein in the sum of $1000, together with interest thereon at 6 per cent. per annum from the eighth day of January, A. D. 1934, on said assessment, which allegation you also deny in the answer filed by you on behalf of said defendant.

(B) That the first defense in said answer is in part sham, in that the said Trustee did in fact on or about the twenty-seventh day of October, 1933, disclaim title to said ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J., and on the date of said assessment, the said defendant was in law and in fact the legal owner of said ten (10) shares of the stock of said the Union National Bank of Atlantic City, N. J., upon which said assessment was levied.

(C) That the second defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and said defense is therefore insufficient in law to constitute and does not on its face disclose a valid defense in law to plaintiff's complaint.

(D) That the third defense is frivolous, in that the said defendant's adjudication and discharge in bankruptcy does not relieve him from responsibility for this assessment, and defendant's liability for said assessment was not a provable debt or claim at the time of the defendant's adjudication or discharge in bankruptcy; and said defense is therefore insufficient in law to constitute and does not on its face disclose a valid defense in law to plaintiff's complaint.

(E) That the fourth defense is frivolous, in that defendant's adjudication and discharge in bankruptcy

does not relieve him of responsibility for said assessment, and said defendant's liability for said assessment was not as surety and was not provable against defendant's estate in bankruptcy at the time of his adjudication or discharge; and said defense is therefore insufficient in law to constitute and does not on its face disclose a valid defense in law to plaintiff's complaint.

(F) That the fifth defense is frivolous, in that defendant's adjudication and discharge in bankruptcy does not relieve him of responsibility for said assessment, and said defendant's liability for said assessment was not at the time of defendant's adjudication or discharge in bankruptcy a debt or liability founded upon an implied contract and provable at the time of the defendant's adjudication or discharge in bankruptcy within the meaning and intent of the Act of Congress, and said defense is therefore insufficient in law to constitute and does not on its face disclose a valid defense in law to plaintiff's complaint.

(G) That the sixth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and said defendant's liability for assessment did not in law accrue at the time of or prior to defendant's discharge in bankruptcy, and was, therefore, not a provable debt or claim, and said defense is therefore insufficient in law to constitute and does not on its face disclose a valid defense in law to plaintiff's complaint.

(H) That the seventh defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller

of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares.

(I) That the eighth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares.

(J) That the ninth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and pro-

vided, no liability attached to the said defendant by reason of his ownership of said shares.

(K) That the tenth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares.

(L) That the eleventh defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares.

(M) That the twelfth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for

said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares.

(N) That the thirteenth defense is frivolous because defendant's adjudication and discharge in bankruptcy does not discharge the said defendant from liability for said assessment, and the other matters alleged in said defense are immaterial, and do not on their face disclose a valid defense to plaintiff's complaint, because at no time prior to the date on which the Comptroller of the Currency of the United States levied the assessment in question was the said defendant indebted to any person by reason of his ownership of said ten (10) shares of stock, and unless and until an assessment was levied by the Comptroller of the Currency in accordance with the provisions of the statute in such case made and provided, no liability attached to the said defendant by reason of his ownership of said shares, and

TAKE FURTHER NOTICE, at said time and place, we shall make application for the entry of summary judgment herein; and attached hereto are copies of the affidavits upon which said application will be made.

Dated November 27, 1934.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

AFFIDAVITS.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

LAURENCE A. SLAUGHTER, of full age, being duly sworn, according to law upon his oath, deposes and says:

1. I am the plaintiff in this action which is brought by me as receiver of The Union National Bank of Atlantic City, N. J., to recover of the defendant the sum of $1000, together with interest thereon at six per cent. per annum from January 8, 1934, the particulars whereof are as follows:

A. Prior to the thirteenth day of January, A. D. 1933, the defendant, William Elmer Brown, Jr., was the owner of ten (10) shares of the capital stock of The Union National Bank of Atlantic City, N. J., a banking association organized under the laws of the United States of America, located in the City of Atlantic City, County of Atlantic and State of New Jersey.

B. On or about the thirteenth day of December, A. D. 1933, the said The Union National Bank of Atlantic City, N. J., became and was by the Comptroller of the Currency of the United States declared insolvent and ordered closed, and on said date, deponent was by said Comptroller of the Currency of the United States appointed receiver thereof. A true copy of the determination of said Comptroller of the Currency declaring said The Union National Bank of Atlantic City, N. J., insolvent, and appointing deponent as receiver thereof is annexed hereto and made a part hereof, the same being marked "Schedule 1". Said original determination and appointment, or a duly certified copy thereof, will be produced at the argument of this motion.

C. On or about the eighth day of January, A. D. 1934, the said Comptroller of the Currency, by virtue

of the authority vested in him by law and in the manner required by law, did make an assessment and requisition upon the shareholders of the said The Union National Bank of Atlantic City, N. J., for $100,000 to be paid by them on or before the fifteenth day of February, 1934, and did thereby make demand upon each and everyone of the shareholders of said bank for the par value of each and every share of the capital stock of said association held or owned by them respectively; and said Comptroller did direct deponent to take all necessary proceedings by suit or otherwise, to enforce to that extent the said individual liability of said shareholders. A true copy of said assessment is annexed hereto and made a part hereof, the same being marked "Schedule 2". A duly certified copy of said assessment will be produced at the argument of this motion.

D. The said William Elmer Brown, Jr., is a stockholder of said The Union National Bank of Atlantic City, N. J., according to the books of said The Union National Bank of Atlantic City, N. J., and owns ten (10) shares of the capital stock thereof. The stock book of said The Union National Bank of Atlantic City, N. J., will be produced at the argument of this motion.

E. Deponent notified said defendant, William Elmer Brown, Jr., of said assessment, and did demand that said defendant pay the amount thereof assessed against him, to wit: $1000, representing an assessment of $100 per share upon each of the ten (10) shares of the capital stock of said The Union National Bank of Atlantic City, N. J., owned by the said William Elmer Brown, Jr., on the date said bank was declared insolvent and ordered closed.

F. The said defendant has neglected and refused to pay the amount of said assessment or any part thereof.

2. There is due and owing to deponent by said defendant, William Elmer Brown, Jr., upon said assessment, the sum of $1000, together with interest thereon at six per cent. per annum, from January 8, 1934.

3. Deponent believes that there is no defense to this action.

LAURENCE A. SLAUGHTER.

Sworn and subscribed to before me this twenty-fourth day of November, A. D. 1934.

FLORA J. COXE,
Notary Public of New Jersey.

SCHEDULE 1.

No. 4420

TREASURY DEPARTMENT

OFFICE OF THE COMPTROLLER OF THE CURRENCY

Washington, D. C., December 13, 1933.

WHEREAS, from information on file in this bureau, I am satisfied that "The Union National Bank of Atlantic City," located in the City of Atlantic City, County of Atlantic, and State of New Jersey, is insolvent and unable to pay its just and legal debts:

NOW, THEREFORE, I, J. F. T. O'CONNOR, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of Section 1 of an Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks, and for other purposes," approved June 30, 1876, do hereby appoint Laurence A. Slaughter, receiver of "The Union National Bank of Atlantic City," with all the powers, duties and responsibilities given

to or imposed upon a receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this thirteenth day of December, A. D. 1933.

J. F. T. O'CONNOR,
(Seal) *Comptroller of the Currency.*

CERTIFICATE FOR CERTIFIED COPY.

TREASURY DEPARTMENT,
OFFICE OF THE
COMPTROLLER OF THE
CURRENCY,
} *ss.:*

Under the provisions of Section 884 of the Revised Statutes of the United States, I. F. G. Awalt, Acting Comptroller of the Currency, do hereby certify that the foregoing is a true and complete copy of the original commission of Laurence A. Slaughter, as receiver of "The Union National Bank of Atlantic City," New Jersey, dated December 13, 1933, and signed by J. F. T. O'Connor, Comptroller of the Currency, and of the whole of such original on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this ninth day of April, A. D. 1934.

F. G. AWALT,
(Seal) *Acting Comptroller of the Currency.*

SCHEDULE 2.

ASSESSMENT UPON SHAREHOLDERS.

No. 4420

TREASURY DEPARTMENT
OFFICE OF THE COMPTROLLER OF THE CURRENCY

Washington, January 8, 1934.

In the matter of
The Union National Bank of
Atlantic City, New Jersey.

To all whom it may concern:

WHEREAS, upon a proper accounting by the receiver heretofore appointed to collect the assets of "The Union National Bank of Atlantic City," New Jersey, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act.

NOW, THEREFORE, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The Union National Bank of Atlantic City," for one hundred thousand ($100,000.00) dollars, to be paid by them on or before the fifteenth day of February, 1934, and I hereby make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Laurence A. Slaughter, the receiver here-

tofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

IN WITNESS WHEREOF I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this eighth day of January, A. D. 1934.

J. F. T. O'CONNOR,
(Seal) *Comptroller of the Currency.*

CERTIFICATE FOR CERTIFIED COPY.

TREASURY DEPARTMENT,
OFFICE OF THE
COMPTROLLER OF THE
CURRENCY,
} *ss.:*

Under the provisions of the Section 884 of the Revised Statutes of the United States, I. F. G. Awalt, Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original order of assessment upon shareholders of "The Union National Bank of Atlantic City," New Jersey, insolvent, for the par value of each share, levied under date of January 8, 1934, and signed by J. F. T. O'Connor, Comptroller of the Currency, and of the whole of such original on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this twenty-eighth day of May, A. D. 1934.

F. G. AWALT,
(Seal) *Acting Comptroller of the Currency.*

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

CLARENCE E. KNAUER, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. On the eighth day of May, 1933, I was duly appointed Trustee in Bankruptcy of the Estate of William Elmer Brown, Jr., bankrupt.

2. Thereafter, as such Trustee, I proceeded with the administration of the estate of said bankrupt.

3. As said Trustee, there came into my hands ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J., which said shares were registered in the name of William Elmer Brown, Jr.

4. After investigation, I concluded that there was no equity in said ten (10) shares of stock; and that said ten (10) shares of stock would be burdensome to the bankrupt estate which I was administering.

5. Accordingly, I prepared a petition to the Honorable Robert E. Steedle, referee in bankruptcy, for authority to abandon all title to and disclaim all the interest of said bankrupt in said ten (10) shares of stock.

6. In pursuance to the prayer of said petition, the said Honorable Robert E. Steedle, referee in bankruptcy, did, on the twenty-seventh day of October, 1933, by order bearing said date, direct me to abandon all title to and disclaim all the interest of said bankrupt in said ten (10) shares of stock. A true copy of said order is annexed to this affidavit and made a part hereof.

CLARENCE E. KNAUER.

Sworn and subscribed to before me this twenty-third day of November, A. D. 1934.

FRANCES DOLIN,
A Notary Public of N. J.

(Copy)

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF NEW JERSEY.

IN BANKRUPTCY.

In the Matter of
William Elmer Brown, Jr.,
Bankrupt.

ORDER TO ABANDON.

Clarence E. Knauer, Trustee of the above-named bankrupt, having filed his petition, requesting leave to abandon certain property of the bankrupt, on the ground that there is no equity in the said property for the unsecured creditors and the same is therefore burdensome to the bankrupt estate, and it appearing that the prayer of the petition should be granted;

IT IS, therefore, on this twenty-seventh day of October, A. D. 1933, ORDERED that the said Clarence E. Knauer, Trustee of the said William Elmer Brown, Jr., bankrupt, be and he is hereby authorized and directed to abandon all title to and to disclaim all the interest of the bankrupt in the following:

Ten shares of Union National Bank stock.

ROBERT E. STEEDLE,
Referee in Bankruptcy.

Service of a copy of the within notice of motion and affidavits is hereby acknowledged this twenty-seventh day of November, A. D. 1934.

BOLTE & TRIPICIAN,
Attorneys for Defendant.

AFFIDAVIT.

(Filed April 13, 1935.)

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF NEW JERSEY.

ACTION AT LAW.

ON MOTION FOR SUMMARY JUDGMENT.

Laurence A. Slaughter, Receiver of the Union National Bank of Atlantic City, New Jersey,
Plaintiff,

v.

William Elmer Brown, Jr.,
Defendant.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

WILLIAM ELMER BROWN, JR., of full age, being duly sworn according to law, deposes and says:

1. I am the defendant named in the above-entitled cause.

2. Union National Bank of Atlantic City, New Jersey, of which the above-named Laurence A. Slaughter is receiver, is a banking corporation organized under the laws of the United States of America.

3. On September 30, 1931, said Union National Bank of Atlantic City was insolvent and, therefore, unable to continue its business. To avoid imminent

disaster and the calamitous result to other financial institutions of Atlantic City said bank did, therefore, on that date, enter into a written agreement with the Atlantic City National Bank, also a banking corporation of the United States of America, a copy of which contract is attached hereto, marked Exhibit 1 and by this reference is made a part hereof. I am informed from such source that I believe it to be true and therefore aver that as a further indemnity against loss to said Atlantic City National Bank certain of the directors of the Union National Bank assumed individual liabilities to said Atlantic City National Bank, limited in each instance to the sum of $8000. Said individual liabilities were assumed at the time and in connection with the execution of the aforesaid agreement between said two banks and as evidence of said liabilities said directors executed and delivered promissory notes. Also I am informed from such source that I believe it to be true and therefore aver that as a further inducement and consideration to said Atlantic City National Bank to assume the obligations and duties provided for by the aforesaid agreement with said Union National, certain of the banks and financial institutions of Atlantic City then contributed to a fund totaling $100,000 (of which sum the Atlantic City National Bank was to assume $20,000) for the purpose of further indemnifying said Atlantic City National Bank against loss as the result of the obligations assumed by it under said agreement. Said guarantees of said individual directors and the creation of the said fund of $100,000 was required by said Atlantic City National Bank by reason of the then insolvent status of said Union National Bank and the then apparent lack of sufficient value of assets of said Union National Bank to equal the total liabilities which were being assumed by said Atlantic City National Bank.

4. Thereafter and on or about said September 30, 1931, said Union National Bank of Atlantic City discontinued business and it and the said the Atlantic City National Bank proceeded to perform and do the things which they had agreed to perform and do in the aforesaid agreement. Accordingly said Union National Bank delivered all of its assets to said the Atlantic City National Bank and the latter took possession thereof. Also said the Atlantic City National Bank then and there assumed all of the liabilities of said Union National Bank.

5. At the time aforesaid the liabilities of said Union National Bank consisted of current operation expenses, depositors accounts and moneys borrowed from correspondent banks.

6. I am informed from such source that I believe it to be true and, therefore, depose and say that promptly after the transfer of said assets as aforesaid said the Atlantic City National Bank paid all the liabilities of said Union National Bank as agreed.

7. As a result of the transfer of said assets and the assumption and payment of said liabilities as aforesaid, said Union National Bank thereafter had no debts, claims or liabilities outstanding and owing by it except such as it might thereafter have to said the Atlantic City National Bank under and by virtue of the terms of the aforesaid agreement.

8. At a special meeting of shareholders of the Union National Bank of Atlantic City, New Jersey, held on the afternoon of December 15, 1931, a resolution was regularly adopted and passed of which the following is an excerpt:

"Resolved that the Union National Bank of Atlantic City, New Jersey, be placed in voluntary

liquidation under the provisions of Sections 5220 and 5221 of the United States Revised Statutes, to take effect December 15, 1931, and that the Atlantic City National Bank be appointed liquidating agent or liquidation committee of said bank;'' &c.

9. Thereafter said Union National Bank notified the Comptroller of the Currency of the United States of its intention to dissolve and go into liquidation and notice thereof was given in the form and manner required by law.

10. Also at said meeting of stockholders of said Union National Bank of Atlantic City held on December 15, 1931, the aforesaid agreement of September 30, 1931, was ratified and approved.

11. On January 30, 1933, the Atlantic City National Bank was declared insolvent by the Comptroller of the Currency of the United States and Laurence A. Slaughter, who, as receiver of the Union National Bank of Atlantic City, is the plaintiff herein, was duly appointed receiver of said the Atlantic City National Bank and immediately entered into possession of the property and assets of the Union National Bank of Atlantic City under the terms and provisions of said agreement dated September 30, 1931, as well as the property and assets of said the Atlantic City National Bank and has ever since then been administering the affairs of said the Atlantic City National Bank.

12. On April 21, 1933, I was adjudicated a bankrupt by order of this Court.

13. On July 31, 1933, I was discharged of all of my debts and claims.

14. The ten shares of stock of the Union National Bank of Atlantic City referred to in the complaint

filed in this cause by plaintiff were included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank of Atlantic City was included in the list of creditors filed therein.

15. I also stated my liability for assessment on the said ten shares of stock among the various debts and liabilities then existing against me and from the payment of which I asked to be discharged.

16. Said Atlantic City National Bank and said Laurence A. Slaughter, its receiver, were included in the list of creditors filed by me in said bankruptcy proceedings and had due and timely notice thereof.

17. On or about December 13, 1933, the said Union National Bank of Atlantic City was declared insolvent by the Comptroller of the Currency of the United States of America and on said date said Laurence A. Slaughter was appointed by said Comptroller to act as receiver thereof.

18. At the time that I was adjudicated a bankrupt as aforesaid it had been determined and from then until now it has been definitely determined and known that said Union National Bank was insolvent. Said Union National Bank was throughout all of that time and ever since September 30, 1931, had been closed to business. Also at said time it had been determined and throughout said period it was definitely known that the assets of said Union National Bank were insufficient in value to liquidate at a sum equal to the value placed upon them by said agreement of September 30, 1931.

19. Also at the time that I was adjudicated a bankrupt as aforesaid it had been determined and from then until now it has been definitely determined and known that an assessment and requisition upon the

shareholders of said Union National Bank to the total par value of the amount of stock outstanding would be necessary to pay the debts and claims of said bank.

20. The facts stated in the eighteenth and nineteenth paragraphs of this affidavit were well known to the said Laurence A. Slaughter at the time I was adjudicated a bankrupt and for a long time prior to his appointment as receiver of said Union National Bank as aforesaid. This is verified by the fact that some time prior to his appointment as aforesaid he the said Laurence A. Slaughter, as receiver of Atlantic City National Bank, Trustee of Edwin J. Holland, filed in the Court of Chancery of New Jersey an accounting of receipts and disbursements of said Trustee wherein he did claim allowance for disbursement noted as follows: "Less amount assessed by Laurence A. Slaughter, Receiver of Atlantic City National Bank, successor to Union National Bank by merger on 1 share Union National Bank stock, $100."

WILLIAM ELMER BROWN, JR.

Sworn and subscribed to before me this sixth day of March, 1935.

EDNA C. HELLER,
Notary Public of New Jersey.
My commission expires January 12, 1936.

EXHIBIT 1.

AGREEMENT made this Thirtieth day of September, Nineteen hundred and thirty-one, between ATLANTIC CITY NATIONAL BANK, a Banking Corporation of the United States of America, (hereinafter called Buyer); and UNION NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY, a like corporation, (hereinafter called Seller), WITNESSETH:

In consideration of the payment by Buyer to Seller of the sum of SIXTEEN HUNDRED EIGHTY-SIX THOUSAND NINE HUNDRED SEVENTY-SEVEN and 63/100 ($1,686,977.63) DOLLARS, which is to be paid by the assumption of all liabilities of Seller as shown by its books at the close of business this day amounting to $1,686,977.63 except liabilities to shareholders as such, Seller hereby sells, transfers and assigns unto Buyer, all of its real estate, bills and notes receivable, cash, mortgages, bonds and stocks, and all property of every kind whatsoever which it owns or in which it has any interest, delivery to be made herewith.

Seller covenants that the assets sold and conveyed hereby are of the full value above set forth, and hereby agrees to pay upon demand to Buyer a sum equal to any loss which Buyer may sustain by reason of the assets so sold, liquidating less than the value herein placed upon them, with interest until liquidated.

The banking house and fixtures of Seller are taken at the valuation of $353,000.00, and no loss shall be claimed by Buyer by reason of said real estate and fixtures proving worth less than that sum.

Buyer shall keep a separate account of the assets herein purchased and its acceptance of renewals or part payments of any note or notes herein purchased shall not be considered as an assumption by Buyer of any eventual loss on such note or notes which it may sustain, so as to relieve Seller from liability for the deficiency.

The amount of the liability of Seller shall be fixed at the expiration of two years from this date, at which time all notes, regardless of renewals thereof, which shall then be uncollected by Buyer, shall be deemed losses.

Seller agrees to execute and deliver from time to time, such deeds, conveyances, assignments, endorsements and other documents as shall require the execu-

tion of the Seller in order to effectuate the purchase of this agreement.

IN WITNESS WHEREOF, the Atlantic City National Bank has caused these presents to be signed by its President and its corporate seal to be hereto attached duly attested by its Vice President, and Union National Bank of Atlantic City, New Jersey, has caused these presents to be signed by its Vice President and its corporate seal to be attached duly attested by its Cashier, all the day and year first above written.

ATLANTIC CITY NATIONAL BANK

By: (S) JOHN C. SLAPE
President.

UNION NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY

By (S) EDWARD C. RYON
Vice President.

Signed, sealed and delivered
in the presence of:

ATTEST:

(S) L. E. CONOVER, JR.
Vice President.

ATTEST:

(S) GEORGE F. WINGATE
Cashier.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

BE IT REMEMBERED, That on this 30th day of September in the year of our Lord, one thousand nine hundred and thirty-one, before me a Master in Chancery of New Jersey personally appeared LEMUEL E. CONOVER, JR., who being duly sworn, on his oath made due proof, to my satisfaction, that John C. Slape is President and deponent is Vice President of the ATLANTIC CITY NATIONAL BANK, Corporation grantee in the within agreement; that deponent well knows the common seal of said Corporation; that the seal affixed to said agreement is the common seal of said Corporation and was so affixed thereto and said agreement was signed and delivered by said President in the presence of deponent, as the voluntary act and deed of said Corporation, pursuant to resolution of the Directors thereof, and that deponent thereupon signed his name thereto as a witness thereof.

(S) LEMUEL E. CONOVER, JR.

Sworn and subscribed before me the day and year aforesaid. All of which I do hereby certify.

(S) JOHN E. ISZARD
M. C. C. of N. J.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

BE IT REMEMBERED, That on this 30th day of September in the year of our Lord, one thousand nine hundred and thirty-one, before me a Master in Chancery of New Jersey, personally appeared George F. Wingate who being duly sworn, on his oath made due proof, to my satisfaction, that Edward C. Ryon is Vice President and deponent is Cashier of the UNION NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY, Corporation Grantor in the within agreement; that deponent well knows the common seal of said Corporation; that the seal affixed to said agreement is the common seal of said Corporation and was so affixed thereto and said agreement was signed and delivered by said President in the presence of deponent, as the voluntary act and deed of said Corporation, pursuant to resolution of the Directors thereof, and that deponent thereupon signed his name thereto as a witness thereof.

(S) GEORGE F. WINGATE.

Sworn and subscribed before me the day and year aforesaid. All of which I do hereby certify.

(S) JOHN E. ISZARD
M. C. C. of N. J.

SUPPLEMENTAL AFFIDAVIT OF PLAINTIFF.

(Filed April 13, 1935.)

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

LAURENCE A. SLAUGHTER, of full age, being duly sworn according to law, on his oath, deposes and says:

1. I submit this affidavit by way of supplement to the original affidavit heretofore filed by me and for the purpose of answering several of the allegations contained in the answering affidavit filed on behalf of the defendant.

2. It is not true as averred in paragraph 3 of the affidavit filed by the defendant that as a further indemnity against the loss to the Atlantic City National Bank for the execution of said agreement, dated September 30, 1931, that certain directors of the Union National Bank assumed individual liabilities to said Atlantic City National Bank, limited in each instance to the sum of $8000, for which said directors executed and delivered promissory notes. The true facts of the situation are as follows:

The directors of the Union National Bank had agreed to purchase from the Atlantic City National Bank certain parcels of real estate, which the latter had acquired from the Union National Bank by virtue of the agreement dated September 30, 1931 for the sum of $80,000, for which each director (there being ten in number) was to give his individual note in the sum of $8000 to the Atlantic City National Bank. The said ten directors had contemplated forming a corporation to which said real estate was to be conveyed in consideration of the issuance to each of said directors of one-tenth of the capital stock of said corporation, which stock, when so issued, was to be assigned to the Atlantic City National Bank as collateral security for the pay-

ment of said ten promissory notes. The contemplated corporation was never organized and no conveyance of the property in question was made, so that the legal title thereto always remained and is still vested in the Atlantic City National Bank. Only seven of the said ten directors made and delivered their respective promissory notes for $8000 each, and only one of said promissory notes, to-wit: one executed Edward C. Ryan was paid, and this note was paid by applying a deposit liability of the Atlantic City National Bank to the said Edward C. Ryan in satisfaction of the amount of said note, said Edward C. Ryan, at that time, being dead and his estate being administered by the Guarantee Trust Company of Atlantic City. I, as receiver of the Atlantic City National Bank, have recently entered into an agreement with the persons who made said several promissory notes and the executors of Edward C. Ryan, deceased, whereby I am given complete authority to operate said properties and disburse all income derived therefrom after operating expenses, etc., on account of the indebtedness evidenced by said several promissory notes, and when such indebtedness is paid, to divide the balance between the several makers of said notes, as their interest appears.

3. In paragraph 20 of defendant's affidavit, it is stated that prior to my appointment as receiver of the Union National Bank, I, as receiver of the Atlantic City National Bank, Trustee of Edwin J. Holland, filed in the Court of Chancery of New Jersey an accounting of the receipts and disbursements of said Trustee, wherein I did claim allowance for disbursements noted as follows: "Less amount assessed by Laurence A. Slaughter, Receiver of the Atlantic City National Bank, successor to Union National Bank by merger on one share Union National Bank stock, $100.00." The facts in reference

to this allegation are as follows: The Atlantic City National Bank, prior to suspension, was the successor Trustee under a certain trust indenture executed between Edwin J. Holland and the Marine Trust Company of Atlantic City. Part of the corpus of this trust consisted of one share of the capital stock of the Union National Bank. Upon the insolvency of the Atlantic City National Bank, it became disqualified further to act as Trustee under said trust indenture and I filed a petition in the Court of Chancery on behalf of the Atlantic City National Bank and myself, praying that I and said bank be discharged and released of all further duties in connection with said trust and that I be permitted to turn over the corpus of said trust and accrued income, after making a proper accounting, to the successor trustee, to-wit: The First National Bank of Absecon. My petition for discharge was filed in the Court of Chancery on December 6, 1933, which was but seven days before the Comptroller of the Currency appointed me as receiver of the Union National Bank. At the time of the filing of said petition for discharge, the several *cestui que trustent,* under said trust indenture, were all represented by John D. McMullin, Esq. At the time of the filing of said petition for discharge, I knew that the receiver would be appointed by the Comptroller of the Currency for the Union National Bank and that said Comptroller would levy an assessment upon the stockholders of said bank and I also knew that I would be appointed receiver of the Union National Bank. Therefore, in order to avoid future negotiations with the successor Trustee and, possibly, future litigation, it was agreed between me and John D. McMullin, Esq., representing all of the *cestui que trustent,* under said trust indenture, that I should deduct from the money to be turned over to the successor Trustee the amount of the assessment, which I knew would subse-

quently be levied by the Comptroller of the Currency upon the shareholders of Union National Bank. This was entirely a matter of personal agreement between myself and John D. McMullin, Esq.

LAURENCE A. SLAUGHTER,

Sworn and subscribed to before me this twelfth day of April, 1935.

FLORA J. COXE,
(Seal) *Notary Public.*

ORDER SUBSTITUTING PARTY PLAINTIFF.

(Filed April 24, 1935.)

It appearing that since the institution of this suit, the plaintiff, Laurence A. Slaughter, receiver of the Union National Bank of Atlantic City, N. J., has resigned as said receiver, and that Edward J. O'Keefe was appointed receiver of said Union National Bank of Atlantic City, N. J., by the Comptroller of the Currency, on April 16, 1935; and motion having been made to substitute the said Edward J. O'Keefe as party plaintiff herein, in the place and stead of the said Laurence A. Slaughter;

IT IS, on this twenty-fourth day of April, A. D. 1935, ORDERED, that Edward J. O'Keefe, receiver of the Union National Bank, be and he is hereby substituted as plaintiff in the place and stead of Laurence A. Slaughter, resigned.

JOHN BOYD AVIS,
Judge.

We consent to the making and entry of the above order.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.
BOLTE & TRIPICIAN,
Attorneys for Defendant.

MEMORANDUM.

(Filed July 19, 1935).

IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF NEW JERSEY.

L-4392.

ACTION AT LAW.

ON MOTION TO STRIKE ANSWER AND FOR SUMMARY JUDGMENT.

Edward J. O'Keefe, Receiver of the Union National Bank of Atlantic City, New Jersey,
Plaintiff,

v.

William Elmer Brown, Jr.,
Defendant.

BOURGEOIS & COULOMB (WILLIAM B. HUNTER of Counsel) for plaintiff;
BOLTE & TRIPICIAN for defendant.

AVIS, *District Judge:*

The receiver instituted suit against defendant based upon an assessment made by the Comptroller of the Currency against stockholders of the Union National Bank, an insolvent banking corporation. In the complaint it is alleged that defendant at the time the assessment was levied owned ten shares of the capital stock of the bank, of a par value of $100 per share. The assessment, made on January 8, 1934, was 100 per cent. The defendant's alleged liability is $1000. The answer admits all of the material allegations of the com-

plaint, but sets up thirteen separate defenses as a bar to the action. The first defense states that defendant was adjudicated a bankrupt on April 21, 1933, and that by reason thereof from that time on he was not the legal or equitable owner of said shares of stock, and consequently is not liable for the assessment. It is not necessary to discuss this defense as defendant in his brief consents that it be stricken.

Defenses "Second" to "Seventh", inclusive, are all based upon the assertion and apparent facts that defendant was, on April 21, 1933, adjudicated a bankrupt, and was duly discharged on July 31, 1933, and that defendant included the stock as an asset and his liability to assessment thereon in his scheduled list of debts.

The plaintiff moves to strike the answer and the defenses set up, claiming all of them to be frivolous or sham. It does not seem necessary to specifically set forth the various defenses interposed. Many combinations are disclosed in the items set forth, but a study thereof reveals the actual points to be as follows:

(1) That the listing of the stock as an asset, and the liability to assessment thereon as a debt, and the liability for assessment not having been excepted in the discharge, the defendant was discharged from the indebtedness.

(2) That the liability for assessment was a provable debt at the time of adjudication and discharge because—

(a) Defendant was a surety;

(b) Debt or liability was founded on implied contract;

(c) Liability had occurred at the time of and prior to defendant's discharge and was then a provable debt;

(d) Insolvency of, sale of assets, and voluntary liquidation of Union National Bank prior to adjudication and discharge, rendered the debt provable;

(e) Claim under assessment on stock was a provable debt and capable of being enforced at the time of adjudication and discharge.

As to the first question, no cases are cited in brief, and the Court has found none, which even suggest that in a case of this character the court has any right to except from discharge any debts of the bankrupt. The statute (11 U. S. C. A. sec. 35) provides that the discharge "shall release the bankrupt from all of his provable debts," except such as are particularly scheduled therein.

In Remington on Bankruptcy (4th ed.), vol. 7, sec. 3440, it is set forth:

> "In some reported cases, the bankruptcy court, in granting a discharge, uses language indicating that it considers it to be within the court's function, when the discharge is granted, to limit or qualify its effect.
>
> Notably is this so in regard to individual bankruptcies where the individual bankrupt is also a member of a partnership, the courts sometimes attempting to qualify the order of discharge by limiting it to individual debts. However, in general, the bankruptcy court in granting a discharge should not attempt to limit the effect of the discharge, the sole function of the court being to grant or refuse the discharge, the law itself then fixing the extent and effect of the discharge. Thus, in cases of individual bankruptcies, the discharge should be, in the words of the form of the order, 'from all provable debts excepting those excepted' by the statute. If, then, the statute does not except partnership debts, the court should not attempt to do so."
>
> (Pages 667-8.)

The mere fact of scheduling and the failure to except the claim in discharge, cannot be relied upon as a defense in this action.

The second question is as to whether the claim under assessment was a provable debt at the time of adjudication. While it may be that a creditor might have leave to prove a debt accruing after adjudication, under the circumstances in this case, as ascertained from the pleadings and an examination of the cases, I am satisfied that the question involved is whether the amount due on the assessment was or was not a provable claim at the time of adjudication.

I am unable to agree with the decided cases holding that a stockholder in a national bank becomes a surety as to his liability for assessment to pay the creditors of an insolvent institution. See *McClaine v. Rankin*, 197 U. S. 154. The court in that case on page 161 said:

> "Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. If section 5151 had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of section 5151 do not mean that the stockholder promises the creditor *as surety* for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and statutory." (Italics mine.)

See, also, *Thomas v. Matthiessen*, 232 U. S. 221, 236.

Under the early cases it is somewhat debatable as to whether the obligation is a contract or a claim based upon a statutory liability. Under different circumstances the courts have come to different conclusions.

It is quite clear that the one in whose name stock stands on the books of the association remains liable for assessment, so long as the stock is allowed to stand in his name. See, *Matteson v. Dent*, 176 U. S. 521, 530.

The case of *McClaine v. Rankin*, 197 U. S. 154, supra, involved the statute of limitations as applied to an action instituted to recover an assessment in a national bank matter, and the court said in conclusion:

> "But here the right to sue did not obtain until the Comptroller of the Currency had acted, and his order was the basis of the suit. The statute of limitations did not commence to run until assessment made, and then it ran as against an action to enforce the statutory liability and not an action for breach of contract."

(pages 162-3.)

This decision of the Supreme Court as applied to the matters involved in the instant action has never been changed or reversed. On the contrary it has been uniformly followed to make effective the statute imposing double liability on holders of national bank stock.

See the opinion in *Christopher v. Norvell*, 201 U. S. 216, wherein the court, on pages 225 and 226, fully sustains the principle declared in the McClaine case. See, also, *Thomas v. Matthiessen*, 232 U. S. 221, supra.

The case of *Armstrong v. McAdams* (C. C. A. 8) 46 F. (2d) 931 was an action to recover on an assessment made by the Comptroller, and involved the question of the statute of limitations. The decision in the case of McClaine v. Rankin as to the action arising from a statutory liability and not out of contract express or implied, was discussed and approved.

The doctrine of the McClaine case was followed in the case of *Holman v. Clark* (E. D. Mich. N. D.) 48 F. (2d) 253. After citing from the Supreme Court case the court said on page 254:

"Section 5151 of the United States Revised Statutes to which the court there referred is now sections 63, 64 of title 12 of the United States Code (12 U. S. C. A. sections 63, 64), already hereinbefore quoted. That decision has not been overruled or modified, either expressly or by inference, and is therefore clearly binding upon this court and decisive of the question now under consideration."

In the case of *Thomas v. Commonwealth Trust Co. of Pittsburgh* (W. D. Pa.) 2 F. Supp. 654, which involved the right to recover against the committee of a lunatic, the court approved the principle stated in the McClaine case, and, on page 655, said:

"The question under immediate consideration is essentially the same as was before the Supreme Court in Christopher v. Norvell, 201 U. S. 216, 26 S. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740. In that case the stockholder was a married woman, who, under the statutes of the state of her residence, was incapable of entering into a contract. As in the present case, it was there asserted by the defendant below that the relation of the shareholder to a national bank is wholly contractual in character, and that the inability of defendant to contract freed her from liability for her share of the assessment. The court held that the liability did not arise wholly out of contract, but was collateral and statutory, and that the defendant was subject to assessment. See, also, Keyser v. Hitz, 133 U. S. 138, 10 S. Ct. 290, 33 L. Ed. 531; McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500; Thomas v. Matthiessen, 232 U. S. 221, 235, 34 S. Ct. 312, 58 L. Ed. 577.

The purpose of the statute (section 64, supra) is manifest. Congress desired to protect creditors of national banks, and to strengthen such banks with the public by imposing upon them this liability of the shareholders as a safeguard. If cer-

tain stockholders are to be free from liability for reasons such as advanced in the instant case, the purpose of Congress would be seriously affected."

In the case of *Rogers v. Jarden*, 3 F. Supp. 211, which affected the question of proper pleading in the Eastern District of Pennsylvania, the court, in approving the doctrine set forth in the McClaine case, said on pages 212-3:

"The Supreme Court of the United States has recognized this form of liability as contractual in some aspects and noncontractual in others. In McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 411, 49 L. Ed. 702, 3 Ann. Cas. 500, it was held that an action to enforce the statutory liability was not 'an action upon a contract or liability, express or implied, which is not in writing . . .' within the meaning of a state statute of limitations. To the same general effect is Christopher v. Norvell, 201 U. S. 216, 26 S. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740, where the state law construed prohibited a married woman from entering into a contract which would subject her to personal liability. For the limited purpose of construing these state statutes, the stockholder's statutory liability was held noncontractual.

On the other hand, in Matteson v. Dent, in holding the liability to be a debt of the estate of a deceased stockholder, the court said: 'The obligation of a subscriber to stock to contribute to the amount of his subscription for the purpose of the payment of debts is contractual, and arises from the subscription to the stock. . . . This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder.'

The situation which produced the apparent diversity of rulings in the foregoing cases exists in the present case. The trouble is that the Legislature usually fails to recognize and provide for

quasi contractual obligations as a separate and distinct class, and, in construing the various statutes, it is necessary, therefore, to attempt to classify them as either contractual or noncontractual. In each case the governing consideration is the policy of the statute or law to be construed and what it was intended to accomplish."

The case of *Hendrickson v. Helmer* (Idaho, S. D.) 7 F. Supp. 627 was an action by a trustee in bankruptcy to set aside an alleged fraudulent conveyance made by the bankrupt to his wife four years before the assessment on his bank stock was made by the Comptroller. The court stated that under the Idaho law a transfer to a wife in good faith for the purpose of making a gift, and not to defraud existing creditors was valid, and that the validity of such fraudulent conveyance against creditors does not depend upon subsequent events.

Discussing the legal aspects as affected by the decision in the McClaine case the court said on pages 628-9:

"Whether a conveyance of property is fraudulent or not, it must appear that there were existing creditors at the time of the alleged fraudulent transfer and that the transfer was made with the intent to delay or defraud such creditors. Section 54-906, I. C. A. As has been said, the liability of the bankrupt as a stockholder was statutory and contingent, depending upon the bank's inability to pay its debts and contracts. To say that the bankrupt was a debtor of the bank by reason of his contingent liability on his stock four years before it was known and determined that the bank could not pay its debts and contracts and the assessment made by the Comptroller would be indulging in the realm of uncertainty which may never occur. If such reasoning is accepted, then a stockholder of a national bank could never in good faith convey any property while he owned

stock without it being subject to cancellation in the event that at some future time the bank became insolvent and unable to pay its creditors."

In approving the doctrine in the McClaine case the court said on page 628:

> "The liability of a shareholder in a national bank to respond to an assessment in case of insolvency as prescribed by section 64, title 12 U. S. C. A., is statutory, and, upon the failure of the bank, the rights of its creditors intervene and attach. Scott v. Deweese, 181 U. S. 202, 21 S. Ct. 585, 45 L. Ed. 822; Concord First National Bank v. Hawkins, 174 U. S. 364, 19 S. Ct. 139, 43 L. Ed. 1007; Salter v. Williams et al. (D. C.) 219 F. 1017. It is for the benefit of the bank's creditors represented by the receiver of the bank, and is conditional and contingent, and the right to sue does not obtain until the Comptroller has acted, which is the basis of the suit. McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500. The bank being insolvent and having creditors at the time it closed, the individual liability of its stockholders existed to such debts, contracts, and engagements of the bank."

There are some cases, as against estates, devisees and legatees, in which it is held that the liability arises prior to the insolvency of the bank, and prior to the assessment by the Comptroller, for the purpose of charging the estates or beneficiaries with the payment of the assessment, but these decisions do not change the basic principle adopted in the McClaine case.

As stated by Judge Kirkpatrick in the case of *Rogers v. Jarden,* 3 F. Supp. 211, supra: "In each case the governing consideration is the policy of the statute or law to be construed and what it was intended to accomplish."

I am convinced that, under the facts in the instant case, the doctrine of the McClaine case is controlling;

that the obligation of the defendant did not arise out of contract, express or implied, but was in the nature of a statutory liability, and that the debt arising therefrom became due and owing at the time the assessment was made. The liability of the shareholder, as to the debts of the national bank, is with relation to those debts owing at the time the assessment is made.

It is claimed by defendant that the Union National Bank was insolvent on September 30, 1931, when, for purposes of liquidation, it sold all of its assets to the Atlantic City National Bank, under an agreement, which, among other things, provided that the Union National Bank should, upon the expiration of the period of two years, the time fixed for liquidation, repay to Atlantic City National Bank the amounts due on unpaid notes, which were to be considered as losses. This is the liability upon which the Comptroller declared the bank insolvent and appointed a receiver and subsequently levied an assessment.

If the Union National Bank was actually insolvent on September 30, 1931, the date of the agreement, the liability of the defendant could not be fixed on that date. Many of the creditors' claims had been satisfied before the actual declaration of insolvency by the Comptroller, and it was impossible to fix the defendant's liability until after the bank had been taken over by the Comptroller.

The statute, found in 12 U. S. C. A. sec. 65, providing for the fixing of the liability by the court, as to banks in liquidation, could not advance the time of the defendant's liability, unless court proceedings had been taken thereunder.

In the case of *Scovill v. Thayer,* 105 U. S. 143, which was an action to recover an assessment on stock of a corporation, not fully paid, and involved the time of the commencement of the running of the statute of

limitations, the court, as to the time when the cause of action accrued, said, on pages 155-6:

> "The question for solution is, therefore, When, under the facts of this case, did the cause of action accrue against the defendant in error? Certainly not until it became his duty to pay according to the terms of his contract or according to law.
>
> It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. Curry v. Woodward, 53 Ala. 371; Robinson v. Bank of Darien, &c., 18 Ga. 65; Ward v. Griswoldville Manufacturing Co., 16 Conn. 593. But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the Statute of Limitations does not begin to run in his favor until such order or demand. Van Hook v. Whitlock, 3 Paige (N. Y.), 409; Salisbury v. Black's Adm'r, 6 Har. & J. (Md.) 293; Sinkler v. The Turnpike Company, 3 Pa. 149; Walter v. Walter, 1 Whart. (Pa.) 292; Quigg v. Kittredge, 18 N. H. 137; Nimmo v. Walker, 14 La. Ann. 581.
>
> In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to

pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete."

Hawkins v. Glenn, 131 U. S. 319, was a case involving similar questions, and the court in that case said on page 332:

> "Some further observations may not inappropriately be added. Unpaid subscriptions are assets, but have frequently been treated by courts of equity as if impressed with a trust sub modo, upon the view that, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust, and that therefore statutes of limitation do not commence to run in respect to them, until the retention of the money has become adverse by a refusal to pay upon due requisition.
>
> But the conclusion as to the statute need not be rested on that ground; for, although the occurrence of the necessity of resorting to unpaid stock may be said to fix the liability of the subscriber to respond, he cannot be allowed to insist that the amount required to discharge him became instantly payable though unascertained, and though there was no request, or its equivalent, for payment."

Under all of the circumstances of the instant case, I am satisfied that the ownership of the stock was in the defendant at the time of assessment; that the obligation was not a provable claim against the bankrupt estate at the time of adjudication; that the discharge of defendant as a bankrupt did not relieve him from the assessment on his stock made thereafter; and that the fact that the Union National Bank went into vol-

untary liquidation prior to defendant's adjudication as a bankrupt could not fix the liability of defendant prior to adjudication, unless proceedings had been taken prior thereto under the provisions of 12 USCA sec. 65.

The answer will be stricken as sham, the defenses "First" to "Thirteen", inclusive, will be stricken as sham or frivolous, and a rule for summary judgment will be entered for the amount of the assessment with interest and costs.

RULE STRIKING ANSWER AND FOR SUMMARY JUDGMENT.

(Filed July 23, 1935.)

IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF NEW JERSEY.

L-4392. ACTION AT LAW.

ON MOTION TO STRIKE ANSWER AND FOR SUMMARY JUDGMENT.

Edward J. O'Keefe, Receiver of the Union National Bank of Atlantic City, New Jersey, (Substituted for Laurence A. Slaughter, Former Plaintiff),
Plaintiff,

v.

William Elmer Brown, Jr.,
Defendant.

This matter coming on to be heard in the presence of William B. Hunter, of the firm of Bourgeois & Coulomb, attorneys for plaintiff, and Bolte & Tripician, attorneys for defendant, on April 13, 1935, on plaintiff's motion to strike the answer filed herein, upon the grounds that said answer is sham and frivolous and for the entry of a summary judgment; and the court having considered the arguments of counsel and being of the opinion that the defenses set up in said answer are all either sham or frivolous, and that a summary judgment should be entered herein in favor of the plaintiff and against the defendant;

IT IS, on this twentieth day of July, A. D. 1935, on motion of Bourgeois & Coulomb, attorneys for plaintiff, ORDERED, that the answer and defenses filed

herein be and the same are hereby stricken and that judgment be entered in favor of the plaintiff, Edward J. O'Keefe, receiver of the Union National Bank of Atlantic City, N. J., and against the defendant in the amount of $1000, together with interest at 6 per cent. per annum from the eighth day of January, A. D. 1934, to date, amounting to the sum of $92, making in all the sum of $1092, together with costs, to be taxed.

JOHN BOYD AVIS,
Judge.

On motion of

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

EXCEPTION.

(Filed September 4, 1935.)

An order having been entered in this cause on July 20, 1935, directing that the answer and defenses filed herein be stricken, and that judgment be entered in favor of plaintiff and against the defendant, and defendant having prayed an exception to this rule, an exception thereto is allowed accordingly.

JOHN BOYD AVIS,
District Court Judge.

Dated August 29, 1935.

We consent to the entry of the above exception.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

NOTICE OF APPEAL.

(Filed September 10, 1935.)

To Edward J. O'Keefe, Receiver of The Union National Bank of Atlantic City, N. J (Substituted for Laurence A. Slaughter), Plaintiff:

You are hereby notified that William Elmer Brown, Jr., the defendant in the above cause, appeals from the whole of the judgment, in the sum of $1092.00 and costs, rendered against him in your favor in this cause on July 20, 1935, and from the order of the Court entered herein on that date striking defendant's answer and defenses filed herein and directing that said judgment be entered, said appeal being taken to the United States Circuit Court of Appeals for the Third Circuit.

BOLTE & TRIPICIAN,
By G. ARTHUR BOLTE,
Attorneys for Defendant.

Service of the within notice of appeal is hereby acknowledged this ninth day of September, 1935.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS.

(Filed September 10, 1935.)

And now comes the defendant, by Bolte & Tripician, Esqs., his attorneys, and says that there is error in the record and judgment in this cause and assigns as error upon which he expects to rely in the appellate court the following:

1. The Court erred in striking defendant's answer and defenses filed herein.

2. The Court erred in entering final judgment in favor of the plaintiff.

3. The Court erred in striking the second defense of defendant's answer.

4. The Court erred in striking the third defense of defendant's answer.

5. The Court erred in striking the fourth defense of defendant's answer.

6. The Court erred in striking the fifth defense of defendant's answer.

7. The Court erred in striking the sixth defense of defendant's answer.

8. The Court erred in striking the seventh defense of defendant's answer.

9. The Court erred in striking the eighth defense of defendant's answer.

10. The Court erred in striking the ninth defense of defendant's answer.

11. The Court erred in striking the tenth defense of defendant's answer.

12. The Court erred in striking the eleventh defense of defendant's answer.

13. The Court erred in striking the twelfth defense of defendant's answer.

14. The Court erred in striking the thirteenth defense of defendant's answer.

15. The Court erred in holding that defendant's liability or obligation to pay assessment for the recovery of which this suit was instituted was not a provable claim against the bankrupt estate of this defendant at the time of defendant's adjudication.

16. The Court erred in holding that the fact that the Union National Bank went into voluntary liquidation prior to defendant's adjudication as a bankrupt could not fix the liability of defendant prior to adjudication, unless proceedings had been taken prior thereto under the provisions of 12 U. S. C. A. Sec. 65.

17. The Court erred in holding or ruling that the obligation of defendant to pay assessment upon the stock which he owned in said Union National Bank did not arise out of contract, express or implied.

18. The Court erred in holding or ruling that the debt arising from defendant's stock assessment liability was not a provable debt discharged by defendant's bankruptcy because it did not become due and owing until the assessment was made thereon.

19. The Court erred in holding or ruling in effect that in order for defendant's stock assessment liability to be discharged by reason of defendant's adjudication

in bankruptcy, it was necessary that the debt arising therefrom should be due and owing at the time of said adjudication.

20. The Court erred in holding or ruling that it was impossible to fix the defendant's liability to stock assessment until after the Union National Bank had been taken over by the Comptroller of the Treasury.

21. The Court erred in ruling or holding that "The Statute, found in 12 U. S. C. A. Sec. 65, providing for the fixing of liability by the Court, as to banks in liquidation, could not advance the time of the defendant's liability, unless court proceedings had been taken thereunder."

22. The Court erred in holding or ruling in effect that the defendant's liability to stock assessment did not become a provable debt, dischargeable by bankruptcy, until or unless defendant's liability to stock assessment had been determined either by Court action or proceedings under 12 U. S. C. A. Sec. 65, or by assessment made by the Comptroller of the Treasury, prior to the time of defendant's adjudication, notwithstanding the fact that Union National Bank was then in the process of voluntary liquidation, and insolvent.

23. The Court erred in entering summary judgment in favor of plaintiff and against the defendant and by so doing denying to defendant a trial of the facts alleged in the several defenses set up in defendant's answer.

Wherefore the said defendant, William Elmer Brown, Jr., prays that the said errors be corrected and the judgment of the District Court reversed.

BOLTE & TRIPICIAN,
Attorneys for Defendant.

PETITION OF APPEAL.

(Filed September 10, 1935.)

To the Honorable Judges of the United States District Court for the District of New Jersey:

The petition of William Elmer Brown, Jr., defendant herein, respectfully represents:

That petitioner is aggrieved by the judgment and order herein rendered on July 20, 1935, in favor of plaintiff, Edward J. O'Keefe, receiver of the Union National Bank of Atlantic City, N. J. (substituted for Laurence A. Slaughter, former plaintiff), and against the said defendant for the sum of $1092, together with all costs of suit, and that petitioner, for the reasons specified in the assignment of errors filed herewith, desires to appeal from said decree and desires that said appeal returnable to the Circuit Court of Appeals for the Third Circuit shall operate as a supersedeas and may suspend during the pendency of said appeal the effect of said judgment and order.

Whereupon, petitioner prays that said appeal may be allowed, and that upon his giving bond in an amount to be fixed and approved by this Court the said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the execution and collection of said judgment. Petitioner further prays that said appeal be made returnable to the United States Circuit Court of Appeals for the Third Circuit, according to law, and that a transcript of the records, proceedings, papers and exhibits upon which said order was rendered, duly authenticated, be sent to said Circuit Court of Appeals, and petitioner prays for all general and equitable relief.

BOLTE & TRIPICIAN,
Attorneys for Defendant.

ORDER ALLOWING APPEAL.

(Filed September 10, 1935.)

On motion of Messrs. Bolte & Tripician, attorneys for the defendant herein, and upon filing a petition for an order allowing an appeal and assignments of error,

It is ordered that the petition be and the same is hereby granted and said defendant is hereby allowed to make an appeal to the United States Circuit Court of Appeals, for the Third Circuit, to have reviewed in the United States Circuit Court of Appeals, for the Third Circuit, the judgment and order heretofore entered and filed herein on July 20, 1935, and that the amount of bond on appeal be and hereby is fixed in the sum of twenty-five hundred dollars ($2500), which bond may be executed by the defendant, as principal, and by such surety or sureties as shall be approved by this court, and which shall operate as a supersedeas bond and stay of execution is hereby granted pending the determination of such appeal.

Dated this tenth day of September, 1935.

JOHN BOYD AVIS,
District Court Judge.

BOND.

(Filed September 10, 1935.)

KNOW ALL MEN BY THESE PRESENTS, that we, William Elmer Brown, Jr., of the City of Ventnor City, Atlantic County, New Jersey, as Principal, and Sallie A. Brown, of the City of Atlantic City, same County and State, are held and firmly bound unto Edward J. O'Keefe, Receiver of the Union National Bank of At-

lantic City, N. J., (substituted for Laurence A. Slaughter, former plaintiff), the Plaintiff in the above-entitled action, in the penal sum of Twenty-five Hundred Dollars ($2500.00), lawful money of the United States of America, for the payment of which well and truly to be made, the said principal and said surety do hereby bind themselves, their heirs, administrators, executors and assigns, as the case may be, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Atlantic City, N. J., the ninth day of September, A. D. 1935.

The condition of this undertaking is such that:

WHEREAS, the above-named defendant has appealed, or is about to appeal, to the United States Circuit Court of Appeals for the Third Circuit, from the judgment entered in favor of Plaintiff and against Defendant, in the above-entitled court in the above-entitled action on or about the twentieth day of July, 1935.

NOW, THEREFORE, in consideration of said appeal and of the premises, if the appellant, William Elmer Brown, Jr., defendant above named, shall prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good, then this obligation shall be void, otherwise to remain in full effect, force and virtue.

WILLIAM ELMER BROWN, JR., (L. S.)
Principal.

SALLIE A. BROWN, (L. S.)
Surety.

STATE OF NEW JERSEY,
ATLANTIC COUNTY, } *ss.:*

I, SALLIE A. BROWN, surety on the within bond, being first duly sworn upon oath deposes and says: That I am a resident and freeholder of said county and am worth at least $2500.00 over and above all debts and liabilities by me owing and all property exempt by law from levy or sale upon execution.

SALLIE A. BROWN.

Sworn and subscribed to before me this ninth day of September, 1935.

EDNA C. HELLER,
Notary Public of New Jersey.
My commission expires January 12, 1936.

The within and foregoing bond is approved both as to sufficiency and form and is allowed as a supersedeas on this tenth day of September, 1935.

JOHN BOYD AVIS,
Judge of the United States District Court for the District of New Jersey.

[fol. 70] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Appellant,

vs.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Appellee

And afterwards, to wit, the 5th day of November, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 24th day of January, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 71] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Defendant-Appellant,

v.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Plaintiff-Appellee

Appeal from the District Court of the United States for the District of New Jersey

OPINION—Filed January 24, 1936

Before Buffington, Davis and Thompson, Circuit Judges

BUFFINGTON, J.:

In this case it appears that Brown, the appellant owned ten shares of the stock of the Union National Bank of At-

lantic City, N. J. On April 21, 1933, he filed a petition in bankruptcy, listed such stock as an asset and noted its statutory liability to assessment. After adjudication, his trustee took no steps to decline to accept such stock. Thereafter the court granted Brown's discharge. Following this the bank failed. The Comptroller assessed Brown and, on his refusal to pay such assessment, the receiver brought this [fol. 72] suit against him. On the pleadings, the court below filed an opinion, holding the liability of Brown was not a provable debt in bankruptcy and that "under all the circumstances of the instant case, I am satisfied that the ownership of the stock was in the defendant at the time of the assessment".

Assuming for present purposes that the court was right in its holding that the liability to assessment was not a provable debt, the question remains was the court right in holding that the ownership of the stock was in Brown at the time of the assessment? Now Brown was not liable to assessment unless he was the "real owner" of the stock at the time of assessment, for such is the test laid down in 280 U. S. 496, where it is said: "That the actual owner of the stock may be held for the assessment although his name does not appear upon the transfer books of the bank, is well settled."

Moreover, the fact is that on Brown's bankruptcy the ownership of this stock, by act of law, passed to his creditors and was vested in his trustee. Brown could not sell, control, assert or exercise any act of ownership over it. No doubt, the trustee could, by leave of court, have declined to accept the stock and surrendered it to Brown. But he neither did so nor applied to the court for leave so to do. It follows, therefore, that Brown, having by force of law been deprived of all interest in, or ownership of, the stock and ownership never having revested in him, the court was in error in holding he was the owner when the stock was assessed. Its judgment is, therefore, reversed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 73] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Appellant,

vs.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Appellee

On Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs.

Philadelphia, January 24, 1936.

Per Curiam, Buffington, Circuit Judge.

Endorsements: Order Reversing Judgment, Received & Filed Jan. 24, 1936. Wm. P. Rowland, Clerk.